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SUPREME COURT, U.S.

No. 98-1310

In The

Supreme Court of the United States

October Term, 1998

WILLIAM ZISK AND LOIS ZISK,

Petitioners,

vs.

CITY OF ROSEVILLE, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether parties claiming compensation for inverse condemnation may bring suit in a federal court before exhausting adequate and available state law remedies.

II. Whether recusal is required of a federal judge pursuant to 28 U.S.C. § 455 when the child of that judge is employed as an attorney by the law firm representing a party in an action before that judge, but where the child has no involvement in that action.

III. Whether the setting aside of default against a party pursuant to Federal Rule of Civil Procedure 55 and Federal Rule of Civil Procedure 79(e) is an abuse of discretion when the factual findings demonstrate "good cause" for so doing.

IV. Whether the entry of Order and Judgment by the District Court properly complied with Federal Rule of Civil Procedure 58, when the Order and Judgment were entered and filed separately on the docket of the District Court.

V. Whether the United States Supreme Court may consider, as support for granting review on petitions for writ of certiorari, issues which were not presented to the court of appeals, the decision of which was the basis for the petition for review.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not reported. It is reprinted in Petitioners' Appendix A.

The order of the United States District Court for the Eastern District of California, dated May 23, 1996, partially granting Respondents' Motion to Dismiss, is not reported. It is reprinted in Respondents' Appendix (hereinafter "App.") at 26-35.

The order of the United States District for the Eastern District of California, dated July 11, 1997, granting Respondents' Motion to Dismiss, is not reported. It is reprinted in Petitioners' Appendix B.

JURISDICTION

Petitioners request review of various adverse rulings in this case. Petitioners also request that this Court review substantively identical claims brought by Petitioners long ago in the California state courts.[1] Petitioners have invoked myriad jurisdictional bases to support

[1] Petitioners are also requesting review of *Zisk v. City of Roseville*, No. S-97-0426 GEB/GGH (E.D. Ca.) ("*Zisk II*"). That case is pending before the Court of Appeals for the Ninth Circuit; however, Petitioners have repeatedly moved to extend and/or stay the briefing schedule before the Ninth Circuit while awaiting this Court's disposition on the instant Petition for Writ of Certiorari. Notably, the District Court dismissed *Zisk II* on the grounds of collateral estoppel, in that all issues asserted by Petitioners therein were essentially identical to the matter before this Court.

review by this Court. *See* Petitioners' Petition for Writ of Certiorari at 1.

Respondents respectfully submit that jurisdiction in this Court is presently improper and accordingly object to the jurisdiction of this Court to presently grant a writ of certiorari in this matter. Respondents submit that the judgments for which Petitioners request review are not ripe for adjudication in the federal courts, as Petitioners have failed to complete the requisite exhaustion of available and adequate state remedies for inverse condemnation claims. Further, Respondents suggest that Petitioners have failed to demonstrate any cognizable "compelling" reason under United States Supreme Court Rule 10 for granting Petitioners' Writ of Certiorari. Moreover, Petitioners have not cited any legal precedent demonstrating that the decisions of the lower courts in this matter, as more fully described herein, conflict with decisions of any other United States court of appeals or with the decisions of this Court on these same matters. *See Braxton v. United States*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857 (1991). There is likewise no evidence that any of the decisions in this matter have departed from "the accepted and usual course of judicial proceedings" as to call for the exercise of this Court's supervisory power. *See* Supreme Court Rule 10.

STATEMENT OF THE CASE

A. Statement of Facts

On February 3, 1996, Petitioners filed a First Amended Complaint alleging, *inter alia*, violation of 42

U.S.C. § 1983 and inverse condemnation. These claims ostensibly arose from ordinances which were passed by the CITY OF ROSEVILLE between 1967 and 1991, and flooding, which occurred in 1986 and in 1995. Petitioner are owners of real property in the CITY OF ROSEVILLE and allege that actions taken by the CITY OF ROSEVILLE, through its City Council, in the form of passing certain city ordinances and resolutions, have resulted in injury to Petitioners in decreasing the value of property owned by Petitioners. Petitioners assert such damage occurred when the Council of the CITY OF ROSEVILLE passed ordinances which modified the land owned by Petitioners to "permanent flood plain" status; by placing sewer lines on that land, and illegally entering their property, all allegedly resulting in the land being flooded on two separate occasions. Petitioners also allege the Respondents had a plan, purpose, scheme and design to injure Petitioners in this way. These claims were rejected by the California Third District Court of Appeals. *See Zisk v. City of Roseville*, 56 Cal.App.3d 41, 127 Cal.Rptr. 896 (1976), *review denied*.[2]

B. Procedural History

After service of Petitioners' First Amended Complaint, and retention of the undersigned counsel of

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[2] Upon review, the California Court of Appeals determined that in response to Petitioners' inverse condemnation claims, the city council for CITY OF ROSEVILLE approved payment of the fair market value of the portion of the property being condemned. 56 Cal.App. 3d at 45, 49. Petitioners rejected the offers made by the city council.

record, counsel for CITY OF ROSEVILLE Respondents obtained an agreement from Petitioners that Respondents had an extension of time, up until March 18, 1996, in which to respond to the Amended Complaint. Petitioners were contemporaneously advised that a formal stipulation and order reflecting this agreement for extension of time was required to be filed with the Eastern District Court and that counsel for Respondents would accordingly prepare same and forward it to Petitioners for approval and signature. Counsel for Petitioners prepared and forwarded this Stipulation and Order to Petitioners and subsequently attempted to contact Petitioners to ascertain the status of the Stipulation and Order. Counsel for Respondents left a message but never received a return telephone call. *See* Declaration of Terence J. Cassidy, attached to Reply Brief, App. at 8-13.

The CITY OF ROSEVILLE respondents complied with the agreement as contained in the Stipulation and Order and filed a Motion to Dismiss Petitioners' Amended Complaint on March 18, 1996. Counsel for Respondents first received notice of Petitioners' attempt to disregard the stipulation relating to the extension of time on April 15, 1996, upon receipt of Petitioner's Opposition to Respondents' Motion to Dismiss.

By Order filed May 6, 1996, the district court *sua sponte* denied the request of Petitioners for entry of default due to Respondents' alleged failure to respond. App. at 14-16. The District Court found that requisite "good cause" pursuant to Federal Rule of Civil Procedure 55 existed on the grounds that Petitioners had orally agreed to an extension of time in which Respondents would answer Petitioners' First Amended Complaint, and

that Respondents had meritorious defenses to the claims being asserted. The District Court also found that there was no need for Respondents to file a formal motion in this matter since the motion would have clearly been granted in favor of Respondents. At the same time, the Honorable William B. Shubb, United States District Judge, also denied Petitioners' request for his recusal due to the employment of Judge Shubb's daughter by the law firm representing Respondents. App. at 17-25.

By Memorandum and Order filed May 23, 1996, the District Court granted Respondents' Motion to Dismiss the causes of action for inverse condemnation, conspiracy to pass adverse zoning ordinances, fraud and rescission. App. at 26-35. At that time, the District Court denied Respondents' Motion to Dismiss Petitioners' claims for damages arising from flooding occurring on January 10, 1995. From the time the Order was filed in May, 1996, to the filing of a Notice of Appeal, Petitioners repeatedly filed motions requesting reconsideration of the denials of Petitioners' motions for recusal and entry of default.

On June 26, 1996, the Honorable Judge Shubb recused himself from this case. The case was subsequently reassigned to the Honorable Garland E. Burrell. By Order filed September 20, 1996, Judge Burrell ruled on Petitioners' Motion to Vacate the prior Orders issued by Judge Shubb. App. at 49-55. Specifically, Judge Burrell found that "the mere fact that Judge Shubb chose to recuse himself because of plaintiffs' continued accusations of partiality does not demonstrate that his recusal was required under 28 U.S.C. § 455. Further, there is nothing in the record to suggest that Judge Shubb

intended to vacate orders entered prior to his recusal." App. at 51-52.

Petitioners then moved for reconsideration of Judge Burrell's Orders regarding Petitioner's motions to vacate Judge Shubb's prior Orders and the denial of request for entry of default against Respondents. *See* App. at 42. By Order filed October 23, 1996, Judge Burrell denied this request of Petitioners, and ruled that Petitioners had failed to demonstrate any basis for reconsideration. App. at 56-57. On January 21, 1997, Petitioners again moved for entry of default judgment against Respondents. *See* App. at 42. In a Status Conference Hearing of February 18, 1997, this motion was also denied and Petitioners were warned that the Court would not entertain further motions regarding this matter. *See* App. at 42-43.

On March 18, 1997, Respondents moved to dismiss Petitioners' sole remaining claim for damages caused by flooding which occurred on January 10, 1995. *See* App. at 43, 58-66. Respondents asserted that the claim was not ripe for adjudication in the federal court and thus the federal district court lacked subject matter jurisdiction over the claim. App. at 60-63. Respondents based this motion to dismiss on the grounds that Petitioners had failed to exhaust adequate state remedies which address claims of inverse condemnation. App. at 60-63. By Order filed July 11, 1997, the District Court granted Respondents' Motion to Dismiss. App. at 39-48. In addition, the District Court filed the customary Judgment in a Civil Case, No. 111 of the District Court Docket. App. at 67-69.

On July 21, 1997, Petitioners moved for a new trial, asserting that Respondents were in default and that all

orders made by Judge Shubb should have been vacated. App. at 70-71. Petitioners' motion was denied by Order filed September 11, 1997. App. at 70-73.

Petitioners then moved for Revision of Judgment in a Civil Case on October 10, 1997, again asserting that Respondents were in default and that the judgment as entered did not meet the requirements of Federal Rule of Civil Procedure 58. This motion was denied by order filed December 10, 1997. App. at 74-75.

In the interim, Petitioners filed a Notice of Appeal in the Court of Appeals for the Ninth Circuit on October 10, 1997. App. at 76-77. Following the submission of appellate briefs, the Ninth Circuit filed an unpublished Memorandum decision affirming all rulings made by the district court and denying Petitioners' Motion to remand on August 20, 1998. Pet. App. A. Specifically, the court held that the district court did not abuse its discretion in denying Petitioners' requests to enter default against Respondents, nor in refusing to reconsider the order denying entry of default. Pet. App. A. As to the issue of recusal, the Ninth Circuit found that not only did Judge Shubb not abuse his discretion in denying Petitioners' requests for recusal, but that the District Court was not required to vacate the orders entered by Judge Shubb prior to his ultimate recusal. Pet. App. A. The court likewise rejected Petitioners' assertion that the district court judgment failed to meet the enumerated standards of F.R.Civ.P. 58. Finally, the court expressly held that "all issues not raised in [Petitioners'] opening brief are deemed waived." Pet. App. A.

On November 20, 1998, the Ninth Circuit issued an Order denying Petitioners' Petition for rehearing, rejecting Petitioners' suggestion for rehearing *en banc*, and directing that no further motions be filed or entertained in the appeal. Pet. App. C.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I

Review is Not Presently Proper in this Matter Because Petitioners Have Not Sought Compensation for the Alleged Taking of Property by Respondents Through the Requisite and Adequate Procedures Provided by the State of California Thereby Rendering Petitioners' Claim for Property Damages Unripe for Adjudication by Any Federal Court

On March 18, 1997, Respondents moved to dismiss Petitioners' sole remaining claim for damages caused by flooding which occurred on January 10, 1995. Respondents based this motion on the grounds that the claim was not ripe for adjudication in the federal court and thus the federal district court lacked subject matter jurisdiction over the claim. On July 11, 1997, the court granted Respondents' Motion to Dismiss. In reaching this decision, the district court relied upon the standard as promulgated by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985). In *Williamson*, this Court held that before a takings claim may be filed in a federal court against either a state or local government, a plaintiff must "seek compensation through the procedures the State has provided for doing

so." The Ninth Circuit, adhering to *Williamson*, has similarly held that the failure of a plaintiff "to seek compensation [through available state procedures] . . . renders the taking claim unripe, and the lack of ripeness deprives the court of subject matter jurisdiction." *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). Further, any plaintiff who brings suit in federal court alleging a land-related taking before seeking compensation through the channels provided by the state must overcome a "heavy burden of establishing that state remedies are inadequate." *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990). The adequacy of state-afforded compensation processes are thus presumed adequate unless or until the state courts establish that the plaintiff "may not obtain just compensation through an inverse condemnation action under any circumstances[.]" *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988).

Petitioners assert they were subject to an unconstitutional taking of property, due to their property being damaged by flooding on January 10, 1995. Throughout the course of litigation, however, Petitioners have neither demonstrated nor asserted they have exhausted requisite state procedures for compensation. Similarly, Petitioners have failed to demonstrate or assert that the long-standing damages remedies as provided by the State of California for precisely this type of claim are inadequate. Ironically, the very state court decision referred to by Petitioner, *Zisk v. City of Roseville*, 56 Cal.App.3d 41, 127 Cal.Rptr. 896 (1976), concerns Petitioners' claims for

inverse condemnation in the courts of the State of California for damages allegedly suffered as a result of the same facts which Petitioners herein assert.

Because Petitioners have wholly failed to exhaust available state remedies for compensation, as required by law, their action alleging an unconstitutional taking under United States Constitution Amendment V, in violation of 42 U.S.C. § 1983 is not ripe for adjudication. Thus, Respondents respectfully submit that this Court is presently without jurisdiction in this matter and that review by this Court is therefore inappropriate. Therefore, Petitioners' Petition for Writ of Certiorari should be denied.

II

Review is Not Warranted Because the Opinion of the Ninth Circuit Court of Appeals on Review Finding No Abuse of Discretion Concerning the Recusal of Judge Shubb Was Proper

In the Order of May 1, 1996, the Honorable William B. Shubb denied Petitioners' request for his recusal based upon the employment of Judge Shubb's daughter, Carissa A. Shubb, as an associate attorney with the law firm representing Respondent. Petitioners then made numerous motions to reconsider the rulings by Judge Shubb and ultimately moved to vacate the orders issued by Judge Shubb when Judge Shubb voluntarily recused himself and the case was reassigned to the Honorable Garland E. Burrell. Upon review of the matter, Judge Burrell found that "[t]he mere fact that Judge Shubb chose to recuse himself *because of Plaintiffs' continued accusations of partiality* does not demonstrate that his recusal

was *required* under 28 U.S.C. § 455." Upon review for abuse of discretion, the Ninth Circuit Court of Appeal affirmed the Order of the district court in all respects, holding that Judge Shubb was not required to recuse himself. *See Liteky v. United States*, 510 U.S. 540, 550-51, 555, 114 S.Ct. 1147 (1994); *Cauthon v. Rogers*, 116 F.3d 1334, 1336 (10th Cir. 1997); *United States v. Gordon*, 61 F.3d 263, 267 (4th Cir. 1995); *Yagman v. Republic Ins.*, 987 F.2d 622, 626-27 (9th Cir. 1993) (all holding that a court of appeals reviews allegations of judicial bias for recusal purposes for abuse of discretion).

The standard in any recusal pursuant to 28 U.S.C. § 455 is whether the impartiality of the judge could be questioned by a "*reasonable, well-informed* observer." *Matter of Hatcher*, 150 F.3d 631, 637 (7th Cir. 1998) (emphasis added). *See United States v. Antar*, 53 F.3d 568, 573 (3d Cir. 1995) (recusal appropriate if a "reasonable man, were he to know *all the circumstances*, would harbor doubts as to the judge's impartiality.") (emphasis added) (citations omitted). Under 28 U.S.C. § 455, a federal judge is expected to recuse *sua sponte*, where necessary, "in any proceeding in which his impartiality might reasonably be questioned." *Hatcher*, 150 F.3d at 637. Disqualification is mandatory if a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings." 28 U.S.C. § 455(b)(1). A judge is not, however, compelled to automatically "accept as true the allegations made by the party seeking recusal." *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997). In fact, to the extent that facts surrounding the requested recusal are in dispute, the same

judge whose recusal is at issue makes those factual determinations and decides whether those facts should result in disqualification, always subject to review for abuse of discretion on appeal. *See, e.g., Town of Norfolk v. United States Army Corps of Engineers*, 968 F.2d 1438, 1460 (1st Cir. 1992). Further, "[m]ere conclusory allegations without supporting factual averments are not sufficient to state a claim" for recusal purposes upon which relief can be granted. *Cauthon*, 116 F.3d at 1336; *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996). *See In re United States*, 666 F.2d 690, 694 (1st Cir. 1981) ("unsupported, irrational, or highly tenuous speculation" does not constitute objective circumstances creating requisite appearance of partiality for § 455 purposes). Moreover, various federal courts have held that 28 U.S.C. § 455 does not mandate recusal of a judge on the basis of family relationship where the family member does not actively represent a party in that case. *See Weinberger v. Equifax*, 555 F.2d 456 (5th Cir. 1977) (child of judge who was an associate of law firm representing defendant before that judge did not mandate judge's recusal because § 455 provisions did not apply, as child had not actively participated in the case, and thus neither impropriety nor any appearance thereof mandated recusal); *Wilmington Towing Co., Inc. v. Capever Towing Co., Inc.*, 624 F. Supp. 1210 (E.D.N.Car. 1986) (same); 28 U.S.C. § 455(b)(5)(ii). *Compare In re Ætna Casualty & Surety Co.*, 919 F.2d 1136 (6th Cir. 1990) (*en banc*) (the presence of judge's daughter *as an attorney* in the proceeding before that judge required recusal under 28 U.S.C. § 455).

In this matter, it is clear that Judge Shubb was not required to recuse himself. Judge Shubb's daughter was an associate at Porter, Scott, Weiberg & Delehant (PSWD),

the law firm representing Respondents from August 2, 1993, to November 8, 1996. Pursuant to procedure followed by PSWD in all cases before Judge Shubb, PSWD had sworn under penalty of perjury that Ms. Shubb would have no involvement in any case coming before Judge Shubb. App. at 17-25. Moreover, Petitioners have not even alleged that this procedure as attested to by PSWD was inaccurate, untrue, or that Ms. Shubb had any involvement at any time in this matter. Further, 28 U.S.C. § 455 does not require recusal of a judge due to familial relationship so long as the family member does not actively represent a party in a case before that judge. *See* 28 U.S.C. § 455(b)(5)(ii). Moreover, the Ninth Circuit Court of Appeals has determined that recusal on the part of Judge Shubb specifically based upon PSWD's former relationship with Carissa Shubb is unnecessary under 28 U.S.C. § 455. *See Bartholomew v. Stassi-Lampman*, No. 94-16200 (9th Cir. 1994) (unpublished order, August 21, 1996).

Because the recusal of Judge Shubb was plainly not required according to statutory law and judicial precedent, Petitioners cannot assert that those orders made by Judge Shubb prior to his self-recusal should now be vacated. As Judge Burrell further noted in the Order denying Petitioners' motion to reconsider, "[T]here is nothing in the record to suggest that Judge Shubb intended to vacate orders entered prior to his recusal." App. at 51-52. Since there is no appearance of impropriety in any rulings made by Judge Shubb prior to his recusal, nor any other factor requiring recusal under 28 U.S.C. § 455, vacating orders made by Judge Shubb was

not and is not necessary. Therefore, Respondents respectfully submit that the Order of the District Court and the Memorandum Opinion of the Ninth Circuit regarding recusal and the vacating of orders made by Judge Shubb were not clearly erroneous, and are thus not appropriate for review by this Court.

III

Review is Not Warranted Because the Review by the Ninth Circuit Regarding the Issue of Default under Federal Rule of Civil Procedure 55 Was Conducted Under the Proper Standard of Review, and at No Time During Litigation were Respondents in Default

Federal Rule of Civil Procedure 55 governs defaults and provides as follows:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

In making the equitable determination of "good cause" under F.R.Civ.P. 55, the court is required to consider (1) whether the entry of default was the result of willful or culpable conduct; (2) whether a set-aside would prejudice the plaintiff; and (3) whether the defenses raised following the entry of default are meritorious. *See Thompson v. American Home Assur. Co.*, 95 F.3d 429, 432 (6th Cir. 1996); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984). A district court has the authority and jurisdiction to make determinations regarding the appropriateness of entering a default under F.R.Civ.P. 55(a) without effecting a formal Entry of Default or requiring the filing of a Motion to Set

Aside Default. *See, e.g., Davis v. Parkhill-Goodloe Company, Inc.*, 302 F.2d 489, 495 (5th Cir. 1962). Issues regarding F.R.Civ.P. 55 default and setting aside of default are reviewed for abuse of discretion. *O'Connor v. State of Nevada*, 27 F.3d 357, 362 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1367 (1995); *Canal Ins. Co. v. Ashmore*, 61 F.3d 15, 17 (8th Cir. 1995). Further, the actual entry of default and default judgments are disfavored and any doubts as to the appropriateness thereto should be resolved against the party seeking default. *Ashmore*, 61 F.3d at 17 (*citing Marshall v. Boyd*, 658 F.2d 552, 554 (8th Cir. 1981)).

Respondents respectfully submit *ab initio* that they are not now, and have at no time during the course of the instant litigation ever been, in default. As more fully stated above, Petitioners opposed Respondents' Motion to Dismiss on the grounds that Respondents were in default for failing to file an answer within twenty (20) days from service of the First Amended Complaint. The District Court made a factual finding that Petitioners and Respondents herein entered into an oral agreement in which Petitioners agreed to allow counsel for Respondents up to and including March 18, 1996, to respond to Petitioners' First Amended Complaint. App. at 14-16. In addition, Judge Shubb made a factual finding that Respondents had meritorious defenses to Petitioners' claims. In its Memorandum Decision, the Court of Appeals for the Ninth Circuit found that the district court did not abuse its discretion in denying Petitioners' request to enter default against defendants, nor in refusing to reconsider its order denying the entry of default. Pet. App. A.

Respondents additionally submit that the rulings of the district court and of the Ninth Circuit were proper in this matter. The record is devoid of any evidence to suggest that those factual findings as made by the district court were "clearly erroneous." Further, there is similarly nothing in the record to suggest that the denials of Petitioners' requests relating to entry of default judgment against Respondents was an abuse of discretion. To the contrary, in fact, the record clearly supports the findings of these courts. Moreover, Petitioners wholly failed to furnish any basis for reconsideration of the district court decision, and Judge Burrell accordingly and properly denied reconsideration of the matter. Thus, the relief from default was properly granted and affirmed in favor of Respondents and Petitioners' request for review should be denied.

IV

Review is Not Warranted Because the Plain Facts Demonstrate that the District Court Fully Complied with Federal Rule of Civil Procedure 58 in this Matter

Federal Rule of Civil Procedure 58 provides that "[e]very judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." *See* F.R.Civ.P. 58. *See Corrigan v. Bargala*, 140 F.3d 815, 818 (9th Cir. 1998) (holding that the time for filing notice of appeal begins when judgment is entered in compliance with Rules 58 and 79(e), requiring the clerk to enter judgment of the court in the civil docket). The purpose of this rule is to eliminate confusion as to exactly when the clock for an

appeal begins to run. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384-85, 98 S.Ct. 1117 (1978) (per curiam). This Court has further instructed that the requirements of F.R.Civ.P. 58 "must be mechanically applied in order to avoid new uncertainties as to the date in which judgment is entered." *United States v. Indrelunas*, 411 U.S. 216, 222, 93 S.Ct. 1562, 1565 (1973) (per curiam). Moreover, the Court of Appeals for the Ninth Circuit, the forum in which this matter is contested, "has held fast to a mechanical application of the 'separate judgment' rule, requiring all formalities to be observed." *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218 (9th Cir. 1990).

Respondents respectfully submit that the Judgment in a Civil Case as entered by the District Court fully complied with the requirements of F.R.Civ.P. 58. Although citing few facts and no law in support of their contention, Petitioners nonetheless apparently assert that the entry of judgment in this matter does not comply with F.R.Civ.P. 58. *See* Petitioners' Petition for Writ of Certiorari, "Questions Presented," at ¶5. Docket No. 111 of the District Court, App. at 67-69, clearly reflects the judgment entered by the District Court. This document is entirely separate and distinct from the Order of the court regarding Respondents' Motion to Dismiss. *See* App. at 39-48. Thus, judgment has been properly entered in accordance with Rule 58. Further, the District Court has previously considered and subsequently denied Petitioners' Motion for Revision pursuant to Rule 58. In addition, the Ninth Circuit affirmed the judgment of the District Court, specifically finding the Petitioners' contention in this regard "lacks merit." Pet. App. A. Therefore, Respondents respectfully submit that the judgment was properly

entered by the District Court, the rulings by the lower courts were correct, and that Petitioners' Petition for Writ of Certiorari in this matter be denied.

V

Review is Not Warranted on Any Remaining Questions Which Petitioners Assert Because Petitioners Have Failed to Demonstrate Any Factual Bases or Put Forth Any Legal Arguments Thereto to Support These Extraneous Claims

Petitioners state numerous bases upon which this Court should find review appropriate of this matter. *See* Petitioners' Petition for Writ of Certiorari, "Questions Presented." Respondents respectfully submit, however, that Petitioners have entirely failed to provide any facts or legal arguments to support their diverse allegations, save and except those as addressed by Respondents herein. Accordingly, in spite of these further attempts by Petitioners to additionally complicate the resolution of this matter, such extraneous issues are not properly before this Court for consideration, Thus, Respondents respectfully submit that review of these issues by this Court is similarly inappropriate and Petitioners' Petition for Writ of Certiorari should be denied.

CONCLUSION

Based upon the foregoing, Respondents respectfully submit that Petitioners' Petition for Writ of Certiorari should be denied.

DATED: March 18, 1999

Respectfully submitted,

TERENCE J. CASSIDY*
KRISTINA M. HALL
PORTER, SCOTT, WEIBERG & DELEHANT
A PROFESSIONAL CORPORATION
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Sacramento, CA 95825
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*Counsel of Record
Attorneys for Respondents*

No. 98-1310

In The

Supreme Court of the United States

October Term, 1998

WILLIAM ZISK AND LOIS ZISK,

Petitioners,

vs.

CITY OF ROSEVILLE, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FILED
April 22, 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

ATTORNEYS FOR: Defendants CITY OF ROSEVILLE, HARRY CRABB, JR., PAULINE ROCCUCCI, MEL HAMEL, WILLIAM SATUCCI, RICHARD ROCCUCCI, THOMAS CHAMBLISS, GEORGE A. BULJAN, JUNE WANISH, MICHAEL F. DEAN, STEVEN BRUCKMAN, G. RICHARD BROWN and FREDERICK L. BARNETT

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM J. ZISK and LOIS E. ZISK,

Plaintiffs,

vs.

CITY OF ROSEVILLE, et al.,

Defendants.
_____/

CASE NO. CIV. S-95-2134 WBS GGH

REPLY BRIEF AND RELATED MOTION FOR ENLARGEMENT OF TIME PURSUANT TO F.R.CIV. P.6(b) IN SUPPORT OF MOTION TO DISMISS

DATE: April 29, 1996
TIME: 1:30 p.m.
CTRM: 2

Defendants CITY OF ROSEVILLE, HARRY CRABB, JR., PAULINE ROCCUCCI, MEL HAMEL, WILLIAM SATUCCI, RICHARD ROCCUCCI, THOMAS CHAMBLISS, GEORGE A. BULJAN, JUNE WANISH, MICHAEL F. DEAN, STEVEN BRUCKMAN, G. RICHARD BROWN and FREDERICK L. BARNETT hereby submit the following Reply Brief and related Motion for Enlargement of Time in response to plaintiffs' Opposition to the Notice of Motion to Dismiss and Motion to Dismiss.

I.

BACKGROUND

Plaintiffs oppose the Motion to Dismiss filed on behalf of the CITY OF ROSEVILLE defendants on the ground that defendants failed to file an Answer within 20 days from service of the First Amended Complaint and plaintiffs requested a Clerk's Entry of Default on or about April 8, 1996. For the reasons set forth below, plaintiffs' Opposition is without merit and defendants' Motion to Dismiss should be granted.

The facts and circumstances regarding the CITY OF ROSEVILLE defendants' response to plaintiffs' First Amended Complaint in the form of a Motion to Dismiss is more fully set forth in the Declaration of

counsel Terence J. Cassidy attached hereto as Exhibit "A" and incorporated by reference as though fully set forth herein. Essentially, counsel for the CITY OF ROSEVILLE defendants sought and obtained an agreement from plaintiffs WILLIAM J. and LOIS E. ZISK that said defendants had an extension to respond to the Complaint on or before March 18, 1996. At that time, plaintiffs were advised that a formal Stipulation and Order reflecting that extension of time must be filed with the District Court and therefore we would prepare same and forward it to plaintiffs for approval and signature. Id. There was a brief delay in the forwarding of that Stipulation to plaintiffs, plaintiffs were notified accordingly and the Stipulation was then forwarded to them on March 4, 1996, by correspondence dated February 21, 1996. See Exhibits "B" and "C", the correspondence to plaintiff WILLIAM J. ZISK and the Stipulation and Order Extending Time for Defendants to Respond to Plaintiffs' Complaint, respectively. Our office subsequently contacted plaintiffs to determine the status of the return of the Stipulation and Order, left a message and id not receive a return call.

Counsel for CITY OF ROSEVILLE

defendants complied with the terms of the Stipulation and Order by filing a Motion to Dismiss on March 18, 1996. The first notice counsel received regarding plaintiffs' apparent attempt to disregard our agreement regarding the stipulation of time was upon receipt of plaintiffs' Opposition to the instant Motion to Dismiss on April 15, 1996.

The CITY OF ROSEVILLE defendants hereby respectfully request that the District Court approve the Stipulation and Order regarding the extension of time based upon plaintiffs' previous agreement to extend that time. An original Stipulation and Order replacing the original Stipulation and Order forwarded to plaintiffs is being lodged concurrently herewith. Simply stated, plaintiffs should not now be permitted to disregard an agreement regarding an extension of time once defendants have relied upon that agreement so as to attempt to take a position of advantage over defendants.

For all of those reasons, and as more fully set forth in the Declaration of counsel attached hereto as Exhibit "A", the CITY OF ROSEVILLE defendants respectfully request that the District Court reject plaintiffs' Request for Clerk's Entry of Default and enter the Stipulation and Order

regarding the extension of time and rule upon the merits upon the instant motion to dismiss.

II.

CITY OF ROSEVILLE DEFENDANTS REQUEST AN ENLARGEMENT OF TIME TO RESPOND TO THE FIRST AMENDED COMPLAINT PURSUANT TO F.R.CIV. P. 6(b)

Based on the agreement with plaintiffs WILLIAM J. and LOIS E. ZISK, the CITY OF ROSEVILLE defendants were entitled to a Stipulation and Order extending time within which to respond to the First Amended Complaint on file herein. Without apprising counsel for defendant and/or the District Court of it their hidden intentions, plaintiffs have apparently now disregarded any prior agreement which was fully and properly relied upon by counsel for defendants thereby seeking an advantage over the CITY OF ROSEVILLE defendants. CITY OF ROSEVILLE defendants respectfully submit that the obtaining of the prior agreement of plaintiffs for the extension of time and the good faith processing of the Stipulation and Order for that extension of time constitutes good cause for the enlargement of that time pursuant to F.R.Civ. P.6(b) On that basis, the CITY OF

ROSEVILLE defendants hereby respectfully request that the District Court grant an enlargement of time for the CITY OF ROSEVILLE defendants to respond to the First Amended Complaint up to and including March 18, 1996 and thereby formally approve of the original Stipulation and Order filed concurrently herewith.

III.

THE MOTION TO DISMISS SHOULD BE GRANTED SINCE THERE IS NO OPPOSITION ON THE MERITS.

Plaintiffs have apparently chosen not to submit an opposition to the merits of the Motion to Dismiss filed on behalf of the CITY OF ROSEVILLE defendants. Defendants respectfully submit this is due to the fact that the grounds set forth in the Motion to Dismiss are well taken and dispose of this entire matter. Rather than merely repeating the bases for that motion, defendants will stand on the substance of that motion and hereby respectfully request that the Motion to Dismiss be granted in its entirety.

III.

CONCLUSION

Based on the foregoing, the CITY OF ROSEVILLE defendants respectfully request that

the court approve of the Stipulation and Order for Extension of time to Respond to the Complaint and grant the instant Motion to Dismiss on all grounds.

Dated: March 17, 1999

Respectfully submitted,

PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By

/S/ Terence J. Cassidy

DECLARATION OF COUNSEL

I, Terence J. Cassidy, declare as follows:

I am an attorney at law licensed to practice in all the courts of the State of California and in the United States District Court for the Eastern District of California and am the attorney of record for defendants CITY OF ROSEVILLE, HARRY CRABB, JR., PAULINE ROCCUCCI, MEL HAMEL, WILLIAM SATUCCI, RICHARD ROCCUCCI, THOMAS CHAMBLISS, GEORGE A. BULJAN, JUNE WANISH, MICHAEL F. DEAN, STEVEN BRUCKMAN, G. RICHARD BROWN and FREDERICK L. BARNETT in the above-captioned matter.

This matter was assigned to our office on February 14, 1996. Upon receipt of a copy of the pleadings, including the First Amended Complaint, I attempted to determine which defendants had been served with the Summons and Complaint. Initially, I reviewed this matter with Mr. Mark Doane, the Roseville City Attorney, with respect to those defendants who had advised him they had been served. Nevertheless, it remained unclear whether several of the defendants had been served.

I next contacted the plaintiffs in order to request an extension of time within which to respond to the complaint and further determine which defendants had been served. On February 20, 1996, I spoke with plaintiff Lois J. Zisk and advised her of our request for an extension of time to respond to the complaint. Ms. Zisk advised me that she would have to discuss same with her husband and she would have him contact me. On February 21, 1996, Mr. Zisk contacted me by telephone. At that time I specifically requested that the Zisks grant the CITY OF ROSEVILLE defendants an extension of time up to and including March 18, 1996, to respond to the First Amended Complaint on file in this case. Mr. Zisk agreed on behalf of plaintiffs to grant us that extension of time. I then advised Mr. Zisk that it would be necessary to file a formal Stipulation and Order reflecting that extension of time, indicated that I would prepare and forward same to them for their signatures and upon returning it to our office, would file same with the District Court. Following my conversation with Mr. Zisk, I dictated a confirming correspondence and commenced preparation of the Stipulation and Order reflecting the extension of time.

The undersigned was involved in a

jury trial in the matter of Kahn V. California Department Of Corrections, Sacramento Superior Court No. 539492, which was scheduled to commence on February 26, 1996. During the preparation of that matter for trial, there was some confusion regarding which defendants were to be included in the Stipulation and Order for Extension of Time to Respond to Plaintiffs' Complaint. While preparing for and appearing the first several days of that trial, I reviewed the Stipulation and Order at least two times and found that it was not accurate. Therefore, I directed that it not be sent until I could further review same so that the original being forwarded to the plaintiffs was complete and accurate. The Kahn trial resolved on February 29, 1996 and the original Stipulation and Order was then forwarded to plaintiffs on March 4, 1996, with the cover letter previously completed and dated February 21, 1996. True and correct copies of the correspondence of February 21, 196 and the Stipulation and Order for Extension of Time are attached hereto as Exhibits "B" and "C", respectively.

During the time there was a delay in the forwarding of the Stipulation and Order to plaintiffs, my office contacted the Zisks and advised them that there had been a brief delay

in the preparation of that Stipulation but that it would be forwarded to them as soon as possible.

Thereafter, I became involved in preparation and attendance at a binding arbitration scheduled to commence on March 11, 1996 and a jury trial in the matter of Mahon v. County of Sacramento, USDC-EDCA Civ. S-91-0998 LKK/JFM which was originally scheduled to commence on March 19, 1996, but actually commenced on March 26, 1996, and proceeded until April 15, 1996. On at least one occasion, I requested that my secretary, Kathy Michelakos, contact the Zisks to determine when we could expect to receive the fully signed and dated Stipulation and Order back from them. I made that request prior to or at the time of the preparation and filing of the Motion to Dismiss on or before March 18, 1996. My secretary specifically advised me that she in fact contacted the Zisks and left a message for them regarding return of the original Stipulation and Order. We received no further response from the Zisks until receiving the Opposition to the instant Motion to Dismiss. It should be pointed out that plaintiffs have failed to provide the court with any information regarding these conversations, the agreement to extend time to respond to the

First Amended Complaint and/or the forwarding to them of an appropriate Stipulation and Order extending time to respond.

Inasmuch as plaintiffs WILLIAM J. and LOIS E. ZISK have apparently determined to disregard their agreement regarding the extension of time, the CITY OF ROSEVILLE defendants hereby respectfully submit that good cause exists for the extension of time pursuant to F.R.Civ.P. 6(b) to extend that time. On that basis, defendants respectfully submit and lodge herewith the original Stipulation and Order now containing counsel for defendants' signature, the previous original having been forwarded to the Zisks and not returned. The CITY OF ROSEVILLE defendants respectfully request that the court approve of the Stipulation and Order at this time.

WHEREFORE, the CITY OF ROSEVILLE defendants by and through their undersigned counsel respectfully submit that they have at all times acted in good faith and in compliance with all appropriate District Court Rules and Procedures, that the extension of time previously agreed upon remains appropriate and is support by good cause, and the Motion to Dismiss is well taken and should be granted in its entirety.

The facts set forth above are true and correct and if called upon as a witness, I can competently testify to these matters of fact based upon personal knowledge.

Executed April 22, 1996, at Sacramento, California.

/S/

Terence J. Cassidy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FILED
May 6, 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

----ooOoo----

WILLIAM ZISK and LOIS ZISK

Plaintiffs,

v.

CITY OF ROSEVILLE, et al.

Defendants.

No. Civ. S-95-2134 WBS/GGH

ORDER RE: REQUEST FOR RECUSAL

----ooOoo----

Plaintiffs oppose defendants' motion to dismiss on the ground that defendants failed to file an answer within 20 days from service of the first amended complaint, and are therefore in default. Plaintiffs requested a Clerk's Entry of Default on or about April 8, 1996.

Fed. R. Civ. P. 60(b) provides for relief from default, and is to be "liberally applied." Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984). The factors a court should consider when deciding whether to grant such

relief are (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct led to the default. Id"

This court finds that plaintiffs will not be prejudiced by granting relief from the default. Further, it finds that defendants are likely to have a meritorious defense as articulated in their motion to dismiss. As of yet, plaintiffs have not filed an opposition on the merits to the motion to dismiss, so this court cannot rule conclusively thereon.

Finally, defendants' conduct was not culpable. There appears to have been an oral agreement between plaintiffs and defendants wherein defendants would be allowed more time to file their answer. Plaintiffs said that they would sign a written version of the agreement if the terms were the same as those agreed to orally. Plaintiffs' only objection to the written agreement appears to be that it arrived after the deadline had passed for defendants to answer. It thus appears that there existed between plaintiffs and defendants an oral agreement allowing defendants extra time to answer the complaint, and that defendants reasonably relied upon such agreement, such that no culpable conduct on their part led to the default.

Because all three Falk factors for relief from default weigh in favor of granting such relief, plaintiffs' request for entry of default is hereby DENIED.

IT IS SO ORDERED.

DATED: May 1, 1996

/S/ WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

----ooOoo----

WILLIAM ZISK and LOIS ZISK	No. Civ. S-95-2134 WBS/GGH
Plaintiffs,	ORDER RE: REQUEST FOR RECUSAL
v.	
CITY OF ROSEVILLE, et al.	
Defendants.	

----ooOoo----

On April 25, 1996, plaintiffs filed a letter objecting to the assignment of this case to the undersigned judge. The court construes the letter as a motion for disqualification pursuant to 28 U.S.C. §§ 144 and 455. For the following reasons, that request will be denied.

Preliminarily, 28 U.S.C. § 144 is not implicated in this case because that statute applies only when a judge is alleged to have a personal bias in favor of a party rather than a lawyer or law firm. United States v. Carignan, 600 F.2d 762, 763-64 (9th

Cir. 1979). Here, plaintiffs' objection is predicated upon the fact that my daughter, Carissa Ann Shubb, is employed as an associate attorney in the law firm of Porter, Scott, Weiberg & Delehant. There is no allegation that I have any bias or prejudice in favor or against any party to this lawsuit.

A motion to disqualify a judge under 28 U.S.C. § 455 must be decided by the judge himself. See United States v. Sibla, 424 F.2d 864, 867-68 (9th Cir. 1980). The procedure followed in all cases in which the law rirm of Porter, Scott, Weiberg & Delehant represents a party in any case before me is set forth in the attached letter of understanding, dated September 16, 1993. In short, whenever Porter, Scott, Weiberg & Delehant appears before me, it constitutes a representation that my daughter has not actively participated in that matter. The firm has also agreed to apprise any opposing counsel or party or the nature of that understanding, and has further agreed that so long as the firm continues to represent a party in such a case pending before me, my daughter will take no active part in that matter.

Considering plaintiffs' request pursuant to 28 U.S.C. § 455(a) and (b)(5)(iii), I consider that it would be

inappropriate for me to recuse myself in this case. I do not find that my impartiality can reasonably be questioned by virtue of my daughter's employment by defense counsel's law firm, nor do I find that she has any interest that could be substantially affected by the outcome of this case.

Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977), cited in the letter of understanding, is on point. There, the plaintiff appealed from the district judge's failure to recuse himself under 28 U.S.C § 455 (2) and (b)(5)(ii) upon the ground that his son was an associate of the law firm representing the defendant. The court of appeals held that because the judge's son did not actively participate in Equifax's defense none of the recusal provisions applied Wilmington Towing Company, Inc. v. Cape Fear Towing Company Inc., 624 F.Supp. 1210 (E.D N.C. 1986), also cited in the letter of understanding, is likewise similar to the situation here. In that case, the judge's son worked as a law clerk for the law firm representing the plaintiff during the summer and had tentatively accepted employment with that firm after his graduation from law school.

Because his son had not "acted" as a

lawyer in the proceeding, the trial judge found neither any impropriety nor any appearance of impropriety to justify his recusal from the case. I have also considered plaintiffs' request in light of the Code of Conduct for United States Judges. The Commentary to Canon 3C(3)(d)(ii) states that, "[t]he fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge." A recent Opinion of the Committee on Codes of Conduct confirms that

> "[w]here a judge's child is employed by a law firm in a salaried position (e.g., clerical, paralegal, associate), this fact by itself is not sufficient to raise a reasonable question regarding the judge's impartiality in cases in which the law firm appears. However, a reasonable question as to impartiality would be raised if the child actually worked on the matter before the judge or if the matter otherwise involved the child's duties. In addition, other circumstances could combine to raise a reasonable question as to impartiality. The more responsible the position with the firm which the child holds, the greater likelihood that a reasonable question as to impartiality will be raised."

I find no combination of circumstances that

would raise a reasonable question as to my impartiality. Accordingly, I find nothing in either the statutes or the Canons to disqualify me from hearing this case.

If I were to recuse myself in this case, I would have to do so in all cases in which Porter, Scott, Weiberg & Delehant represents a party. Since that firm regularly represents the municipalities of this district in § 1983 cases, the effect would be to remove myself as the trial judge in a significant body of civil cases filed in this district. Under the circumstances, I do not feel it would be fair to my fellow judges or consistent with my own obligations as a judge to cause such a result when the law does not require me to do so.

This practice is consistent with that followed by the Justices of the United States Supreme Court See Statement of Chief Justice Rehnquist, reprinted at 114 S.Ct. CXI (1993)[1]

Chief Justice Rehnquist decided that he would participate in a case in which his nephew was an associate in a law firm representing one of the parties. The Chief Justice's statement read:

I have been advised by Ronald E. Elberger,

Plaintiffs' request that the undersigned judge recuse himself is therefore DENIED.

Counsel for petitioner in this case, that he is a member of the law firm of Bose McKinney & Evans, and that my nephew is an associate with that firm. I am further advised that my nephew has not worked on the petition for certiorari nor had any involvement in the case at any prior stage of the litigation.

28 U.S.C. § 455 provides that a Justice shall disqualify himself when... (b)... a person within the third degree of relationship to [him]... (ii) is acting as a lawyer in the proceeding...

I and other members of the Court have in the past disqualified ourselves when a person included in § 455(b)(5) was an associate in the law firm representing one of the parties before this Court, even though the person had not participated in the case before the Court or at previous stages of the litigation. The-members of the Court have discussed this question among themselves, and have decided that § 455 does not require disqualification under these circumstances. Therefore, I shall participate in the consideration and disposition of this matter.

The Chief Justice's position has been adopted by the other members of the Court who might find themselves in the same situation. See Statement of Recusal Policy, 114 S.Ct. CIX-CXI (1993) (Rehnquist, C.J., Stevens, O'Connor, Scalia, Kennedy, Thomas, Ginsburg, JJ.)

DATED: May 1, 1996.

/S/ WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

September 16, 1993

Judge William B. Shubb
U.S. District Court
Eastern District
650 Capitol Mall, Room 2042
Sacramento, CA 95814

Re: **Letter of Understanding**

Dear Judge Shubb:

This letter is pursuant to our previous discussions regarding Porter, Scott, Weiberg & Delehant's recent decision to hire your daughter, Carissa Shubb, as an associate. Since Porter, Scott, Weiberg & Delehant is likely to continue having cases assigned to you, we have looked into the effect of 28 U.S.C.A. § 455, which governs the disqualification of Federal District Court judges. As we discussed, so long as Carissa is not actively involved in the proceeding, her position of associate at our firm does not require you to automatically recuse yourself as judge. See Weinberger v. Equifax (5th Cir. 1977) 557 F. 2d 456; Wilmington Towing

Company, Inc. v. Cape Fear Towing Company, Inc., 624 F. Supp. 1210.] Therefore, Porter, Scott, Weiberg & Delehant apprises you that, by virtue of appearing before you in court, Porter, Scott, Weiberg & Delehant represents that Carissa Shubb has not actively participated in the case.

Very truly yours,
PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By
/S/ Ned Weiberg
Managing Partner

U.S. DISTRICT COURT
EASTERN DISTRICT

/S/ William B. Shubb

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FILED
May 23, 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

----ooOoo----

WILLIAM ZISK and LOIS ZISK Plaintiffs, v. CITY OF ROSEVILLE, et al. Defendants.	No. Civ. S-95-2134 WBS/GGH MEMORANDUM AND ORDER RE: MOTION TO DISMISS

----ooOoo----

Defendants move to dismiss plaintiffs' inverse condemnation action for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

FACTUAL BACKGROUND

Pro se plaintiffs own a parcel of real property in the city of Roseville, California. They allege that actions taken by Roseville, through it's city council, agents, and employees, have caused them injury by decreasing the value of the property by passing ordinances down-zoning the land to "permanent floodplain" status and placing sewer lines thereon, illegally entering their

property, and causing the land to be flooded on two occasions. Plaintiffs also allege that defendants had a plan, purpose, scheme and design to injure plaintiffs in this manner.

All ordinances passed by the City of which plaintiffs complain occurred between 1967 and March 20, 1991. The illegal entry of which plaintiffs complain occurred on November 1, 1994. The floodings occurred on February 19, 1986 and January 10, 1995.

On November 24, 1995, plaintiffs filed this action before this court, stating a constitutional claim under the Fifth and Fourteenth Amendments to the U. S. Constitution and Article I, Section 19 of the California Constitution; a claim for violation of and conspiracy to violate civil rights under color of law, 42 U.S.C. §§ 1983, 1985; a claim for state law fraud; and a claim of state law rescission arising from action taken by the city council between 1967 and 1973. A first amended complaint was filed on February 2, 1996.

Defendants move to dismiss under Rule 12(b)(6) on the following grounds: that the constitutional claims are not ripe for review; that the constitutional claims for inverse condemnation cannot proceed against individual defendants; that the §§ 1983 and

1985 claims are barred by the statute of limitations; that plaintiffs have failed to state a claim upon which relief can be granted under § 1985; and that the fraud claim fails to comply with the California Tort Claims Act.

Plaintiffs oppose defendants' motion to dismiss on the ground that defendants are in default for failing to file a timely answer. This court has previously addressed plaintiffs' contention, see Order entered on May 3, 1996 (Civ. S-95-2134) (attached hereto as Appendix A), and will therefore consider the merits of defendants' motion to dismiss.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) may be granted only if it appears to a certainty that the pleader would be entitled to no relief under any state of facts which could be proven. Alonzo v. AFC Property Management Inc , 643 F.2d 578, 579 (9th Cir. 1981). When deciding a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all material factual allegations of the complaint while construing the complaint in favor of the complaining party. Gillespie v. Civiletti, 629 F.2d 637 (9th Cir. 1980). Plaintiffs' complaint must be given a liberal construction, due the

"unartful pleadings" of pro se litigants. Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987).

ANALYSIS

Although plaintiffs state two distinct causes of action, one for violation of the Fifth and Fourteenth Amendments to the United States Constitution, and another for violation of § 1983 and 1985, they will be dealt with in the same manner, since a claim under the Civil Rights Act is the proper method for redressing a constitutional inverse condemnation claim, Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1363 (9th Cir. 1978), and the same statute of limitations applies, regardless of how the claim is phrased. See Norco Construction Inc. v. King County, 801 F 2d 1143, 1144 (9th Cir. 1986).

A. Ripeness

Defendants first contend that, in order to state a claim for inverse condemnation under the U.S. Constitution, plaintiffs must first have sought and been denied compensation in state court, and cite Williamson County Regional Planning Commission v Hamilton Bank, 473 U.S. 172 (1985), in support of this proposition. Williamson does

not, however, require plaintiffs to bring a state court action where it would be futile to do so. Id. at 196-97. Here, the taking at issue took place between 1967 and 1991, as the defendants passed ordinances reducing the value of plaintiffs' land. During most of this time, before 1987, there was no action available in California courts to vindicate an inverse condemnation. Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 686 (9th Cir. 1993). Therefore, even though plaintiffs did not seek remedies in state court, they were not required to do so because it would have been futile to seek such relief at the time the alleged taking occurred. The claim is thus ripe. Id.

B. Inverse Condemnation Against Individual Defendants

Defendants next argue that, under California law, individual officers and agents of a public entity cannot be held liable in an inverse condemnation action. The cases cited, Asher v. Pacific Power and Light Co., 249 F.Supp. 671, 676-77 (N.D.Cal. 1965); Heisman v. City of Los Angeles, 30 Cal.2d 746, 756 (1947), prohibit actions for inverse discrimination brought under Art. I § 19 of the California Constitution, whereas the

inverse condemnation claim here arises from the U. S. Constitution as well.

Nonetheless, the same principle applies under the U. S. Constitution; no inverse condemnation claims may brought against individual defendants. See Wisconsin Truck Center Inc. v. Volvo White Truck Corp., 692 F.Supp. 1030, 1015 (W.D.Wis. 1988); Bieneman v. Chicago, 662 F.Supp. 1297, 1301 (N.D.Ill. 1987); Sterns v. Smith, 551 F.Supp. 32, 36 (S.D.Tex. 1982). The inverse condemnation claims against the individual defendants must therefore be dismissed.

C. Statute of Limitations

The statute of limitations for a § 1983 action to redress a Fifth and Fourteenth Amendment inverse condemnation is one year, the same statute of limitations or personal injuries in the state of California. DeAnza Properties X. Ltd. v. County of Santa Cruz, 936 F.2d 1084, 1085 (9th Cir. 1991). The same limitations period applies to claims brought under § 1935. See Taylor v. Regents of University of California, 993 F.3d 710, 711 (9th Cir. 1993).

All events of which plaintiffs complain, from the passing of the various zoning ordinances which devalued the property

to the allegedly illegal entry onto plaintiffs' property, occurred on or before November 1, 1994, with the sole exception of the flooding on January 10, 1995. The statute of limitations on a constitutional inverse condemnation challenge of a city's ordinance begins to run the date of the ordinance's enactment. See DeAnza, 936 F.2d at 1085. The statute of limitations on other challenged actions of the city begin to run when the plaintiffs know or had reason to know of the asserted injury. See Norco Construction, 801 F.2d at 1146.

Here, the ordinances complained of were all enacted in 1991 or earlier. Thus, the limitations period for any inverse condemnation claim resulting from decreased value of plaintiffs' land by rezoning as "permanent floodplain" passed in 1992 at latest, one year after the enactment of the last ordinance. Additionally, that portion of plaintiffs' claim arising from the allegedly illegal entry by defendants onto their property accrued the date of the entry, November 1, 1994. This too is barred by the one year limitations, since the complaint was filed November 24, 1995, over a year later.

The only portion of the cause of action that survives the statute of

limitations bar, then, is that arising out of the flooding of plaintiffs' property on January 10, 1995. While the court expresses no opinion as to whether plaintiffs can present evidence that the defendants caused this flood, the allegation is not barred, and therefore not subject to dismissal.

D. Plaintiffs' 42 U.S.C § 1985 Claims

It is well settled that claims under § 1985 require allegation of invidious class based discriminatory animus. See Griffith v. Breckenridge, 403 U.S. 88, 102-03 (1971). The first amended complaint contains no allegations that plaintiffs were discriminated against on the basis of race or any other invidious basis. Plaintiffs' § 1985 conspiracy claims must therefore be dismissed.

E. Failure to Comply with Tort Claims Act

Defendants also contend that the state law fraud claim is barred by the California Tort Claims Act's statute of limitations, Cal. Gov. Code § 911.2, which governs fraud claims against government entities. The limitations period is also one year for injuries to real property.

The fraud action accrues as of the date of the fraud, unless plaintiffs plead and

prove concealment of the fraudulent actions, Donabedian v. Manzer, 187 Cal.App.3d 1021, 1028 (1986), or plead and prove that they only recently (within 100 days) discovered the fraud. Toscano v. Los Angeles County Sheriff's Department, 92 Cal App.3d 775, 783 (1979). In such cases, the cause of action accrues on the date of discovery.

Here, plaintiffs have not plead any concealment on the part of the defendants, or delayed discovery on their part. Therefore, as all alleged fraudulent actions complained of in this claim occurred at least one year before the filing of the complaint, this claim is also time barred. If plaintiffs were to plead concealment or delayed discovery, this claim could potentially stand.

F. Rescission

Plaintiffs' final cause of action is for rescission of an eminent domain action filed in 1973. As this took place over twenty years before this complaint was filed, it is clearly time barred. Cal. Gov. Code § 911.2 (time of presentation of claims against government entities is one year); Cal. Civ. Proc. Code § 337 (statute of limitations of rescission action is four years).

CONCLUSION

Following the entry of this order, the only cause or action of plaintiffs' first amended complaint that will remain is the § 1983 claim ~~against~~ the City of Roseville based upon damages caused by the flooding of January 10, 1995. All other claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs are granted ten (10) days from the date of this Order to file a second amended complaint consistent with this Order.

IT IS SO ORDERED

DATED: May 23, 1996

UNITED STATES DISTRICT JUDGE

/S/ WILLIAM B. SHUBB

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FILED
May 3, 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

----ooOoo----

WILLIAM ZISK and LOIS ZISK
Plaintiffs,
v.
CITY OF ROSEVILLE, et al.
Defendants.

No. Civ. S-95-2134 WBS/GGH

ORDER RE: REQUEST FOR DEFAULT

----ooOoo----

Plaintiffs oppose defendants' motion to dismiss on the ground that defendants failed to file an answer within 20 days from service of the first amended complaint, and are therefore in default. Plaintiffs requested a Clerk's Entry of Default on or about April 8, 1996.

Fed. R. Civ. P. 60(b) provides for relief from default, and is to be "liberally applied." Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984). The factors a court Should consider when deciding whether to grant such relief are (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable

conduct led to the default. Id.

This court finds that plaintiffs will not be prejudiced by granting relief from the default. Further, it finds that defendants are likely to have a meritorious defense as articulated in their motion to dismiss. As of yet, plaintiffs have not filed an opposition on the merits to the motion to dismiss, so this court cannot rule conclusively thereon.

Finally, defendants' conduct was not culpable. There appears to have been an oral agreement between plaintiffs and defendants wherein defendants would be allowed more time to file their answer. Plaintiffs said that they would sign a written version of the agreement if the terms were the same as those agreed to orally. Plaintiffs' only objection to the written agreement appears to be that it arrived after the deadline had passed for defendants to answer. It thus appears that there existed between plaintiffs and defendants an oral agreement allowing defendants extra time to answer the complaint, and that defendants reasonably relied upon such agreement, such that no culpable conduct on their part led to the default.

Because all three Falk factors for relief from default weigh in favor of granting such relief, plaintiffs' request for entry of

default is hereby DENIED.

IT IS SO ORDERED

DATED: May 1, 1996

/S/ WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE

FILED
July 11, 1997
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ZISK and LOIS ZISK Plaintiffs, v. CITY OF ROSEVILLE, et al. Defendants.	No. Civ. S-95-2134 WBS/GGH ORDER

Defendant City of Roseville moves to dismiss Plaintiffs' sole remaining claim in this action for lack of jurisdiction. For reasons stated below, the motion is granted.

I.

BACKGROUND

Plaintiffs in propria persona filed this action on November 24, 1995, and amended their complaint on February 2, 1996. Judge

Garcia, who was initially assigned the case, recused himself on February 29, 1996. The Clerk of Court subsequently reassigned the case to Judge Shubb. Plaintiffs moved unsuccessfully to recuse Judge Shubb and to have default entered against Defendants. See Orders filed May 3, 1996.

Defendants then moved to dismiss the complaint, arguing Plaintiffs' claims were not ripe and that they failed to state a claim which would entitle them to relief. Fed. R. Civ. P. 12. On May 23, 1996, Judge Shubb rejected Defendants' argument that the Fifth Amendment taking claims were not ripe, but granted the motion to dismiss as to all but one claim on other grounds. He concluded by stating that

> [f]ollowing the entry of this order, the only cause of action of plaintiffs' first amended complaint that will remain is the § 1983 claim against the City of Roseville based upon damages caused by flooding of January 10, 1995. All other claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs are granted ten (10) days from the date of this Order to file a second amended complaint consistent with this Order.

Plaintiffs did not amend the complaint within the time allotted by Judge Shubb. Instead, on

June 3, 1996, Plaintiffs moved for reconsideration of the May 23 order.

On June 7, 1996, Defendants filed a second motion to dismiss, this time arguing that the action should be dismissed because Plaintiffs violated Judge Shubb's May 23 order by failing to timely amend their complaint. At a status hearing on June 24, 1996, Plaintiffs again objected to Judge Shubb presiding over the case. Based on Plaintiffs' continued protestations, Judge Shubb recused himself. See Order filed June 26, 1996. The case was subsequently reassigned to the undersigned judge.

On July 2, 1996, Defendants renoticed their motion to dismiss on the undersigned judge's law and motion calendar, arguing that Plaintiffs violated Judge Shubb's May 23 order directing them to file an amended complaint within ten days. That motion was denied. See Order filed September 20, 1996. On August 26, 1996, Plaintiffs moved to vacate Judge Shubb's prior orders and "to enter judgment by default" against Defendants. Plaintiffs also moved for reconsideration of Judge Shubb's May 23 order. These motions were denied. See Orders filed September 20, 1996.

A Status (Pretrial Scheduling) Conference order was filed on September 20,

1996, confirming that "Plaintiffs' sole claim consists of a 42 U.S.C. § 1983 claim against the City of Roseville based upon damages caused by flooding on January 10, 1995," and granting Plaintiffs "ten (10) days from the date this order is filed to amend their complaint to cure the defects identified in Judge Shubb's order filed May 23, 1996. . . ." Plaintiffs were cautioned that "[a]fter that date, no further amendments to pleadings is permitted except with leave of court, good cause having been shown."

On September 27, 1996, Plaintiffs filed an ex parte motion seeking an extension of time for compliance with the deadlines in the scheduling order so that they could move for reconsideration of this Court's orders (1) denying their previous motion for reconsideration of Judge Shubb's order denying their request for entry of default against Defendants, and (2) denying their motion to vacate Judge Shubb's prior orders in this case. Plaintiffs filed their motion for reconsideration on these grounds on September 30, 1996. Both motions were denied. See Orders filed October 4, 1996, and October 23, 1996.

On January 21, 1997, Plaintiffs again moved for entry of default judgment against Defendants. The motion was denied and

Plaintiffs were warned not to bring another motion for default judgment based on Defendants' purported failure to respond to the complaint. See Status Conference Hearing, February 18, 1997.

On March 18, 1997, the City of Roseville filed the present motion, in essence, seeking reconsideration of Judge Shubb's May 23 ruling that the remaining damage claim is ripe. On April 18, 1997, Plaintiffs again moved for default judgment against Defendants, notwithstanding the Court's prior admonition.

II.

ANALYSIS

The City of Roseville argues that Plaintiffs' Fifth Amendment claim for damages caused to their property by flooding on January 10, 1995, is not ripe. Plaintiffs do not oppose the substantive basis of the motion. Instead, they continue to assert that the City of Roseville lacks standing to bring the instant motion because they are in default, a meritless argument that has been raised successfully numerous times in this litigation and will not be considered again. School Dist. No. 1J, Multnomah County v. ACandS Inc., 5 F.3d 1255, 1263 (9th Cir.

1993).

In Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194-95 (1985), the Supreme Court stated that before a taking claim can be filed in federal court against a state or local government, the plaintiff must "seek compensation through the procedures the State has provided for doing so." Plaintiffs "failure to seek compensation [through available state procedures and] in state court renders the taking claim unripe, and lack of ripeness deprives the court of subject matter jurisdiction." Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1404 (9th Cir. 1989), cert. denied, 494 U.S. 1016 (1990); see also Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1453 (9th Cir.) (a landowner must affirmatively seek compensation from the state if adequate procedures are available), modified on other grounds, 830 F.2d 968 (9th Cir. 1987), cert denied, 484 U.S. 1043 (1988). A landowner who seeks to sue in federal court before seeking compensation from the state "bears the heavy burden of establishing that state remedies are inadequate." Del Monte Dunes v City of Monterey, 920 F.2d 1496, 1507 (9th Cir. 1990). "A landowner fails to discharge this burden by showing that state

procedures are untested or uncertain." Id.; see Bateson v. Geisse, 857 F.2d 1300, 1306 (9th Cir. 1988) ("Until the state courts establish that [the landowner] may not obtain just compensation through an inverse condemnation action under any circumstances, [the state] procedures are adequate. . . .") "[T]he appropriate point for determining the adequacy of state compensation procedures is at the time the alleged taking occurs." Sinaloa, 882 F.2d at 1402.

Plaintiffs' property was purportedly damaged by flooding in January 1995, which they allege constituted an unconstitutional taking under the Fifth Amendment. However, they failed to demonstrate that they have exhausted state procedures or that state remedies were inadequate as of January 1995. Since California law has long provided damage remedy for the type of taking claim asserted by Plaintiffs against the City of Roseville, Plaintiffs' claim is not ripe and this Court lacks subject matter jurisdiction over the same. Sinaloa, 882 F.2d at 1402.

III.

CONCLUSION

For the aforementioned reasons, the City of Roseville's motion to dismiss

Plaintiffs' sole remaining claim for lack of subject matter jurisdiction is GRANTED. Plaintiffs' motion for default judgment is DENIED. Since all other defendants and claims have been dismissed, see Order filed May 23, 1996, or resolved, see Status (Pretrial Conference) Scheduling Order filed September 20, 1996, the clerk of Court is directed to close this action.

IT IS SO ORDERED.

Dated: July 10, 1997.

UNITED STATES DISTRICT JUDGE
/S/ GARLAND E. BURRELL, JR.

United States District Court
for the
Eastern District of California

* * CERTIFICATE OF SERVICE * *

2:95-CV-02134

Zisk

v.

City of Roseville

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 20, 1996, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies into an inter-office delivery receptacle located in the Clerk's office.

William J. Zisk
SF/GEB
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Roseville, CA 95678

Lois E. Zisk
205 Thomas Street
Roseville, CA 95678

Terence John Cassidy
Porter Scott Weiberg Delehant
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Suite 200
Sacramento, CA 95865

FILED
September 20, 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ZISK and LOIS ZISK

Plaintiffs,

v.

CITY OF ROSEVILLE, et al.

Defendants.

No. Civ. S-95-2134 WBS/GGH

ORDER

Plaintiff in propria persona filed this action on November 24, 1995, and amended their complaint on February 2, 1996. Judge Garcia, who was initially assigned to the case, recused himself on February 29, 1996. The Clerk of Court subsequently reassigned the case to Judge Shubb.

In April 1996, Plaintiffs wrote the Clerk of the Court requesting that entry of default be entered against Defendants and that

Judge Shubb recuse himself because of his daughter's employment with the law firm representing Defendants. Judge Shubb denied both requests. See Orders filed May 3, 1996.

Defendants moved to dismiss Plaintiffs' complaint, arguing they failed to state a claim which would entitle them to relief. Fed.R. Civ.P. 12(b)(6). On May 23, 1996, Judge Shubb granted in part and denied in part Defendants' motion, holding that

> [f]ollowing the entry of this order, the only cause of action of plaintiffs' first amended complaint that will remain is the § 1983 claim against the City of Roseville based upon damages caused by flooding of January 10, 1995. All other claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs are granted ten (10) days from the date of this Order to file a second amended complaint consistent with this Order.

Plaintiffs did not amend the complaint within the time allotted by Judge Shubb. Instead, on June 3, 1996, Plaintiffs moved for reconsideration of the May 23, 1996, order.

On June 7, 1996, Defendants filed a second motion to dismiss, this time arguing that the complaint should be dismissed because Plaintiffs violated Judge Shubb's May 23, 1996, order by failing to timely amend their complaint. At a status hearing on June 24,

1996, Plaintiffs against objected to Judge Shubb presiding over the case. Based on Plaintiffs' continued protestations, Judge Shubb recused himself. See Order filed June 26, 1996. The case was subsequently reassigned to the undersigned judge.

On July 2, 1996, Defendants renoticed their motion to dismiss on the undersigned judge's law and motion calendar. L.R. 230. On August 26, 1996, Plaintiffs moved to vacate Judge Shubb's prior orders and "to enter judgment by default" against defendants. Also pending is Plaintiffs' motion for reconsideration of Judge Shubb's May 23, 1996, order.

II.

ANALYSIS

A.

PLAINTIFFS' MOTION TO VACATE ORDERS

Plaintiffs seek to vacate prior orders in this action based on their contention that Judge Shubb's order of recusal is evidence that this May 3, 1996, order denying their request that he recuse himself was erroneous. Plaintiffs are mistaken. The mere fact that Judge Shubb chose to recuse himself because of Plaintiffs' continued accusations of partiality does not demonstrate

that his recusal was required under 28 U.S.C. §455. Further, there is nothing in the record to suggest that Judge Shubb intended to vacate orders entered prior to his recusal. Accordingly, Plaintiffs' motion to vacate Judge Shubb's orders is denied.[2]

B.

DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss Plaintiffs' complaint pursuant to Fed.R.Civ.P. 41(b)[3], arguing that Plaintiffs' violated Judge

---

Plaintiffs' motions to enter default against Defendants and for reconsideration of Judge Shubb's previous order denying their request for entry of default are also denied. Absent highly unusual circumstances, reconsideration is appropriate only where the court is presented with newly-discovered evidence, is shown to have committed clear error or that the initial decision was manifestly unjust, or that there has been an intervening change in controlling law. School Dist. No. 1J, Multnomah County v. AcandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). Plaintiffs failed to demonstrate that any of these grounds for reconsideration exist.

Federal Rule of Civil Procedure 41 states, in relevant part, that "[f]or failure of plaintiff to . . .comply with . . .any order of court, a defendant may move for dismissal of any action or any claim against him. . . ."

Shubb's May 23, 1996, order directing them to file an amended complaint within ten days. See Order filed May 23, 1996. Plaintiffs counter the motion by continuing to argue that Defendants are in default and, therefore, cannot bring a motion to dismiss. Defendants' motion is denied since Plaintiffs' failure to amend certain claims does not necessarily establish a violation of Judge Shubb's order.

III.

CONCLUSION

For the aforementioned reasons, (1) Plaintiffs' motions to vacate orders entered by Judge Shubb prior to his recusal, for entry of default against Defendants, and for reconsideration of Judge Shubb's order denying entry of default against

Defendants are DENIED, and (2) Defendants' motion to dismiss is DENIED.

IT IS SO ORDERED.

Dated: September 19, 1996

/S/ GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

United States District Court
for the
Eastern District of California
* * CERTIFICATE OF SERVICE * *

2:95-CV-02134

Zisk

v.

City of Roseville

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 20, 1996, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies into an inter-office delivery receptacle located in the Clerk's office.

William J. Zisk
205 Thomas Street
Roseville, CA 95678

SF/GEB

Lois E. Zisk
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Terence John Cassidy
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Post Office Box 255428
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Suite 200
Sacramento, CA 95865

FILED
October 23, 1996

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ZISK and LOIS ZISK	No. Civ. S-95-2134 WBS/GGH
Plaintiffs,	ORDER
v.	
CITY OF ROSEVILLE, et al.	
Defendants.	

Plaintiffs in propria persona move for reconsideration of this Court's order denying their motion to (1) vacate Judge Shubb's prior orders, and (2) reconsider Judge Shubb's order denying their request for entry of default. Reconsideration is generally appropriate only where the court is presented with newly-discovered evidence, is shown to have committed clear error or that the initial decision was manifestly unjust, or that there

has been an intervening change in controlling law. School Dist. No. 1J, Multnomah County v. AcandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993) Plaintiffs failed to demonstrate that any of these grounds for reconsideration exist; therefore, their motion for reconsideration is DENIED.

No further motions for reconsideration or motions for clarification or modification of this order shall be filed or entertained.

IT IS SO ORDERED.

Dated: October 21, 1996

/S/ GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

Law Offices Of
Porter, Scott, Weiberg & Delehant
A Professional Corporation
350 University Avenue, Suite 200
Post Office Box 255428
Sacramento, California 95865
(916) 929-1481

Terence J. Cassidy - SBN: 99180
Kristin M. Engstrom - SBN: 186103
{0036-0128}

ATTORNEYS FOR: Defendant CITY OF ROSEVILLE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FILED
March 10, 1997
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

WILLIAM ZISK and LOIS ZISK Plaintiffs, v. CITY OF ROSEVILLE, et al. Defendants. _____/	No. Civ. S-95-2134 WBS/GGH MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KRISTIN M. ENGSTROM IN SUPPORT THEREOF DATE: May 5, 1997 TIME: 9:00 a.m. CTRM: 6

Defendant CITY OF ROSEVILLE hereby moves to dismiss this case and submits the following points and authorities in support of

this motion.

I

STATEMENT OF FACTS

Plaintiff filed the Complaint giving rise to the instant action on November 24, 1995. By amended Complaint, filed February 2, 1996, plaintiffs WILLIAM J. ZISK and LOIS E. ZISK asserted causes of action of alleged violation of the Fifth and Fourteenth Amendment, 42 U.S.C. §§ 1983 and 1985, and supplemental state law claims for fraud and recision. These claims allegedly arose from ordinances passed by the CITY OF ROSEVILLE between 1967 and 1991, and flooding, which occurred in 1986 and in 1995. On May 23, 1996, the Court dismissed all claims against all individually named defendants, and all claims, save and except a claim under 42 U.S.C § 1983 for inverse condemnation, based upon damages allegedly caused by flooding on January 10, 1995, against defendant CITY OF ROSEVILLE.

The Court's ruling on May 23, 1996, was pursuant to defendant's motion to dismiss for lack of subject matter jurisdiction filed on April 22, 1996. The Court ruled that plaintiffs' claims based on a regulatory taking, while properly raised in federal

court, were barred by the statute of limitations. Plaintiffs' only remaining claim was for inverse condemnation for the 1995 flood. However, the Court failed to analyze the propriety of plaintiffs' physical invasion taking claim in federal court when plaintiffs had failed to seek compensation in state court.

Upon review, defendant continues to assert that the federal court lacks subject matter jurisdiction over plaintiffs' claim for damages resulting from the January 10, 1995 flood of plaintiffs' property, as plaintiffs have yet to seek compensation in state court.

By this motion, defendant seeks to dismiss plaintiffs' claim based on the lack of subject matter jurisdiction.

II

THE MOTION TO DISMISS SHOULD BE GRANTED AS THE COURT LACKS SUBJECT MATTER JURISDICTION

The defense of lack of subject matter jurisdiction cannot be waived. Generally, "the court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction." Augustine v. U.S., 704 F.2d 1074, 1077 (9th Cir. 1983); Fed.R.Civ.P. 12(h)(3).

Defendant respectfully submits that

the Court should dismiss plaintiffs' claims because there is a lack of subject matter jurisdiction.

In Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985), the Supreme Court crafted a two-prong inquiry to determine the subject matter jurisdiction of a taking claim against states or their political subdivisions in federal court. First,

> "...a claim that the application of government regulations affects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id* at 186.

Next, plaintiffs are required to seek compensation through the procedures the State has provided before turning to the federal courts. *Id*. at 194-195. In cases of physical invasion, rather than a regulatory taking, Williamson's final decision requirement is inapplicable as the physical taking is, by definition, a final decision. Sinaloa Lake Owners' Association v. City of Simi Valley, 882 F.2d 1398, 1402 (9th Cir. 1989). Therefore, before an action for a physical invasion taking can be brought in an action

against a State government or one of its political subdivisions in federal court, compensation must first be sought from the State if adequate procedures are available. *Id.* at 1402.

"Physical occupation cases are those where the government physically intrudes upon private property, either directly or by authorizing others to do so." Hall v. City of Santa Barbara, 833 F.2d 1270, 1275 (9th Cir. 1986). *See also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Flood cases involve a permanent physical occupation. Hall, *supra* at n.10.

California law has long provided a damage remedy for takings affected by direct governmental action. Sinaloa, *supra*, at 1402. *See also* Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862, 866-67(1985); Holtz v. San Francisco Bay Area Rapid Transit District, 17 Cal.3d 648, 652 (1976). Thus, a case is not ripe for adjudication until compensation is sought in the state court. Sinaloa, *supra* at 1403-04. Indeed, the federal court lacks subject matter jurisdiction until compensation is sought and

refused in state court. Id. [4]

Here, plaintiffs' only remaining cause of action is for damage allegedly caused by the physical invasion of flood waters onto plaintiffs' property on January 10, 1995. As plaintiffs have not sought compensation in the state court, and there are no allegations or evidence that attempting to do so would be futile, plaintiffs' claim is not ripe for adjudication in this Court, and therefore subject matter jurisdiction is lacking. Accordingly, defendant respectfully submits that its motion to dismiss for lack of subject matter jurisdiction be granted.

IV

CONCLUSION

For the reasons so stated above, defendant respectfully submits that its motion to dismiss for lack of subject matter jurisdiction be granted.

DATED: March 17, 1999

---

[4] The Federal Court will also have jurisdiction if seeking compensation in State Court is determined to be futile. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 196-197 (1985).

Respectfully submitted,
PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By: /S/
Terence J. Cassidy
Kristin M. Engstrom

Zisk v. City of Roseville, et al.
USDC Case No. CIV S-95-2134 GEB/GGH

DECLARATION OF SERVICE

I am a citizen of the United States and a resident of Sacramento County, California. I am over the age of eighteen years and not a party to the within above-entitled action. My business address is P.O. Box 255428, 350 University Avenue, Suite 200, Sacramento, California 95865.
On this date I served:

MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KRISTIN M. ENGSTROM IN SUPPORT THEREOF

[XX] By placing a true copy, enclosed in a sealed envelope, for collection and mailing on this date at the business address shown above following our ordinary business practices. I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that a sealed envelope is placed for

collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid to each party listed below as follows:

[ ] By faxing a true copy to each party listed below listed as follows:

William J. Zisk
205 Thomas Street
Roseville, CA 95678

Lois E. Zisk
205 Thomas Street
Roseville, CA 95678

I declare under penalty of perjury that the foregoing is true and correct.
Executed on March 18, 1997, at Sacramento, California.

/S/
PATRICIA A. SULLY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

FILED
July 11, 1997

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

William Zisk and Lois Zisk

v.

No. CIV S 95 2134 GEB GGH

City of Roseville

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JULY 11, 1997.

Jack L. Wagner,
Clerk of the Court

ENTERED: July 11, 1997

by: _____

B.Bryant, Deputy Clerk

United States District Court
Eastern District of California
July 11, 1997

**CERTIFICATE OF SERVICE **

2:95-cv-02134

Zisk

v.

City of Roseville

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

July 11, 1997, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope to the person(s) hereinafter listed, by depositing said in the U.S. Mail, or by placing said copy(ies) into an inter-office receptacle located in the Clerk's office.

William J Zisk SF/GEB
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Kristin Engstrom
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Post Office Box 255428
350 University Avenue
Suite 200 Sacramento, CA 95865

Jack L. Wagner, Clerk

_____
By: Deputy Clerk

FILED

SEP 11 1997

CLERK, U.S. DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BY_____

DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ZISK and LOIS ZISK	No. Civ. S-95-2134 WBS/GGH
Plaintiffs,	ORDER
v.	
CITY OF ROSEVILLE, et al.	
Defendants.	
_____/	

Plaintiffs' motion for a new trial filed July 21, 1997, is DENIED.

IT IS SO ORDERED.

DATED: September 9, 1997

/S/
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

---

* This case was determined to be suitable for decision without oral argument. L.R.230(h).

United States District Court
for the
Eastern District of California
December 10, 1997

* * CERTIFICATE OF SERVICE * *
2:95-cv-02134

Zisk

v.

City of Roseville

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 10, 1997, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said

copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

GEB

William J. Zisk
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PO Box 255428
350 University Avenue
Suite 200
Sacramento, CA 95865

Jack L. Wagner, Clerk

_____

By: Deputy Clerk

FILED
December 10, 1997

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ZISK and LOIS ZISK,	CIV. S-95-2134 GEB GGH
Plaintiffs,	ORDER*
vs.	
CITY OF ROSEVILLE, et al.,	
Defendants.	

Plaintiffs *in propria persona* filed a "Motion for Revision of: Judgment in a Civil Case, Alternatively for: Relief from: Order filed September 11, 1997." The motion is DENIED.

No motion for reconsideration, modification, or clarification of this order shall be filed or entertained.

IT IS SO ORDERED.

Dated: December 5, 1997

/s/
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

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*This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

WILLIAM J. ZISK
LOIS E. ZISK
205 Thomas Street
Roseville, CA 95678
Telephone: (916) 782-2233
Telecopier: (916) 783-3408

Plaintiff in Pro Per

FILED
October 10, 1997
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM J. ZISK and LOIS E. ZISK,

Plaintiffs

vs.

CITY OF ROSEVILLE, CALIFORNIA, et al,

Defendants

_____/

No. CIV-S-95 2134 GEB/GGH

NOTICE OF APPEAL F.R.A.P., Rule 4(a).(4)

TO THE CLERK OF THE ABOVE ENTITLED COURT:

Pursuant to the provisions of Federal Rules of Civil Procedure, Rules 54(b), 58, and 79(a), plaintiffs hereby submit the following NOTICE OF APPEAL from the purported Judgment in A Civil Case, filed on July 11, 1997 and apparently not being docketed. Plaintiffs do not waive the requirements of the separate document requirement specified in Rule 58, for purposes of a final appealable Judgment. see Bankers Trust Co. v Mallis 435 U.S. 381, 98 S.Ct. 1117, 55 Led 2d 357 (1978). On October 9, 1997, plaintiffs served and filed a separate Notice of Motion and Motion on this issue, being set for hearing on December 1, 1997. Plaintiffs' hereby incorporate by reference plaintiffs' said Notice and Motion herein.

NOTICE IS HEREBY GIVEN that, William J. Zisk and Lois E. Zisk, plaintiffs in the above named case, hereby jointly appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment filed herein on July 11, 1997, including but not limited to all orders of the court of any kind or nature issued in this action since it's commencement through and including the September 11, 1997

filed Order denying plaintiffs' Noticed Motion for New Trial filed July 21, 1997.

Dated: October 10, 1997

/S/ _____
Lois E. Zisk

/S/ _____
William J. Zisk